



**COMMONWEALTH OF MASSACHUSETTS**  
**Board of Registration**  
**of**  
**Hazardous Waste Site Cleanup**  
**Professionals**

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**PROFESSIONAL CONDUCT COMMITTEE**  
**Minutes of Meeting on January 22, 2007**  
[Approved on March 5, 2007]

**Prepared by:** Terry Wood

**Meeting Location:** Weston and Sampson Engineers, Inc., Five Centennial Drive, Peabody, MA.

1. **Call to Order:** Robert Luhrs called the meeting to order at 1:17 p.m. Also present were Gail Batchelder, Janine Commerford, Deborah Farnsworth, Kirk Franklin, Debra Phillips, and Kelley Race. Committee members absent: Christophe Henry, Gretchen Latowsky, Paul Mullen, and Debra Stake. Staff members present were Allan Fierce, Brian Quinlan, Lynn Read, Jan Reitsma, and Terry Wood. Also present were Wesley Stimpson, the LSP Association's Interim Executive Director; Anne Lowery, Maria Pinaud, and Tom Potter of DEP; and Bruce Nickelsen of O'Reilly, Talbot & Okun.
2. **Announcements:** None.
3. **Previous Minutes:** The draft minutes of the meeting held on December 20, 2006 were approved.

**Mr. Luhrs stated that the agenda for the meeting would be changed to start with the Ann Lowery discussion.**

**4. Old Business**

**A. Discussion with Ann Lowery regarding prescreening conferences**

Ms. Lowery stated that she understands that the Committee has some interest in DEP's prescreening conferences. She stated that the prescreening conferences were established in the beginning of 2004 as an opportunity for parties to meet face-to-face soon after an appeal is filed to explore whether issues can be narrowed by agreement or dispositive motion, and to see if the parties are open to the use of alternative dispute resolution. She explained that the

prescreening process lasts no more than ninety days after the appeal is filed. After ninety days, the appeal file is transferred over to the Division of Administrative Law Appeals (DALA). It generally takes about thirty days get the parties in for a hearing and those thirty days count toward the total of ninety. She stated that the prescreening process is a good way to prompt earlier and more frank settlement discussion.

Mr. Fierce asked Ms. Lowery to provide an example of a specific case she has handled. Ms. Lowery stated that the majority of cases she handles are wetlands permit cases. She stated that the parties involved in the permit cases are the applicant, DEP and often some third party such as a conservation commission or citizen group. She stated that the appeal may be brought by the applicant or a third-party. She stated that the in-person conference is generally followed by status reports, conference calls and sometimes visits to the site by the technical people involved in the appeal.

Mr. Luhrs asked whether the decision-makers are generally present for the hearing. Ms. Lowery said that those with decision-making authority are not all generally present and those people often need to be consulted after the hearing.

Mr. Luhrs asked what the success rate has been. Ms. Lowery stated that the goal has been to achieve settlements earlier. She stated that, before the prescreening process was instituted, only 22 percent of cases appealed closed within 180 days after the appeal was filed. Now 67 percent of appeals filed are closed within 180 days.

Ms. Phillips asked if any DEP enforcement cases are also handled in the prescreening process. Ms. Lowery stated that she has handled some enforcement cases. She added that DEP often has a less flexible position in the enforcement cases and, therefore, the prescreening process has had less success in settling them.

Ms. Wood asked how active a role the hearing officers play in getting the parties to settle. Ms. Lowery stated that it depends on the particular case. In the wetland permit cases, the regulations are specifics as to the requirements for success on appeal. She states that she explains the burdens of the regulations and discusses whether DALA can offer the results the appellant is seeking. She states that, after this discussion, the appellant often has second thoughts. She states that she tries not to let people know her personal view of the merits of the appeal because she could be wrong. She tries to inform the parties about the rules and burdens involved in the process.

Mr. Luhrs asked how often the prescreening conferences are adversarial. Ms. Lowery stated that there have been a few angry conferences but not many.

Ms. Luhrs asked about the dispositive motion practice. Ms. Lowery stated that, because of the specific requirements regarding what a party needs to show to successfully appeal, some issues can be decided by dispositive motion. She stated that, at a conference, a party may announce an intention to file a dispositive motion. She states that, in reviewing the file, she also looks to see if there are any issues that could be resolved through dispositive motion.

Mr. Luhrs asked Ms. Wood whether she believes some issues in the Board appeals could also be handled by dispositive motion. Ms. Wood stated her belief that, even though many of the basic facts in the Board's appeal cases are clear in the LSP's written submissions, it is difficult to narrow the issues either by dispositive motion or agreement because of the overriding issues whether the specific facts establish any violations of the rules of professional conduct or are sufficient to warrant discipline. Ms. Wood added that she believes Mr. Fierce is more inclined to believe the issues in the Board appeal cases may be narrowed.

Ms. Wood stated that she believes the prescreening process might be helpful in settling some of the Board appeals if the hearing officer were to explain to the LSP such things as that the hearing officer issues only a recommended decision and plays no role in deciding the level of any discipline.

Mr. Luhrs asked whether it might be useful to explain the issues in a couple of appeal cases to Ms. Lowery so she might better appreciate what the Board's cases involve. Ms. Lowery stated that she has looked at the Board's Web site and the DALA Web site as well.

Mr. Fierce asked whether the prescreening process would be any different if our appeals were no longer handled by DALA but were handled by independent hearing officers. Ms. Lowery stated that the prescreening conferences held at DALA regarding DEP appeals were initially established to attain early settlements. She stated that the prescreening conferences did not often result in settlement so DEP added the prescreening effort.

Ms. Phillips stated that the leverage used in the DEP prescreening process is that if the case is not settled it will be sent to DALA. She wondered whether that leverage would work in the case of LSP Board appeals. Ms. Lowery stated that the individuals seeking permits want to get the permits as soon as possible and therefore have an incentive to work out a settlement in order to obtain the permit. She stated that in DEP enforcement cases it is the Department and not the appellant who wants to move the case along.

Mr. Reitsma asked whether Ms. Lowery saw any downside in having the same person preside over the prescreening conference and the appeal hearing. Ms. Lowery stated that DALA used to assign different judges to the prehearing conference and the subsequent appeal hearing, and she believes DALA still follows this practice. Ms. Wood stated that for the LSP Board cases the same judge has been presiding over our appeals from the prehearing conference through the appeal hearing.

Ms. Lowery stated that in situations where hearsay is admissible during the appeal some parties have concerns about the later admissibility of statements made during settlement discussions and, therefore, prefer that the judge who presides over the prehearing conference not hear the appeal. Ms. Wood and Mr. Fierce stated that hearsay is admissible in LSP Board appeals.

Mr. Fierce stated that he has experience with judges in civil cases who did not hold back regarding their opinions of the litigants' likelihood of success if the case proceeded to trial.

He stated that he believed it would be unfair if those judges were to hear the case. Ms. Lowery stated that the more evaluative the person is during settlement negotiations, the harder it is to retain that person later in the process.

Mr. Fierce stated that the Committee has had many discussions regarding revising the LSP Board appeal process. He asked Ms. Lowery, if the Committee used the prescreening process, she would modify it in any ways to better suit our cases. She stated that she would focus in on our claims and the disputed facts. She stated that the prehearing process may be less successful for Board cases compared to the permit cases because the Board has already determined discipline is appropriate and is unlikely to change its mind.

Ms. Commerford stated that the Committee has looked at different ways to streamline our process including the possibility of having the appeal hearing presided over by a panel made up of a hearing officer and two Board members. She asked Ms. Lowery if she had any thoughts about the hearing panel idea.

Ms. Lowery stated that if the Committee moves from 1 to 3 people presiding over a hearing to increase efficiency some people will smile. She pointed out that, if early in the appeal process the litigant is able to hear different views expressed by people knowledgeable about the way the Board views its regulations and from people knowledgeable about the technical issues involved in LSP practice, the litigant might see things differently.

Ms. Race asked how many people are present at the prescreening conferences. Ms. Lowery stated that the number varies greatly – sometimes there are two people, sometimes twenty-five.

Ms. Race asked what Ms. Lowery does to prepare for the prescreening conference. Ms. Lowery stated that she reads her file on the case that generally includes a copy of the complaint and the request for appeal.

Ms. Read asked what types of dispositive motions Ms. Lowery decides. Ms. Lowery states the typical motions are failure to state a claim, standing issues, issues about the timeliness of the appeal request.

Mr. Fierce asked what the differences are between a prescreening conference and a prehearing conference. Ms. Lowery stated that she does not schedule any dates in the appeal unless they fall within the ninety-day window.

Ms. Commerford asked about the number of cases Ms. Lowery sees each year. Ms. Lowery stated that last year 195 appeals were filed and about ninety percent of them had prescreening conferences.

Mr. Luhrs asked that, considering the small number of appeals filed in the LSP Board cases, whether she could help us with our appeals. Ms. Lowery stated that if she were to preside over the actual appeal hearings that might be an investment of some significant time. She

added that DEP was also looking at some changes at DALA, particularly with cases that have been pending at DALA over one year.

Ms. Wood asked whether it was true that the average time for DALA to issue a decision after a hearing was two years. Mr. Fierce stated that someone in DEP's Office of General Counsel had recently told him that two years was the average.

Mr. Reitsma asked whether there would be any value in the LSP Board adopting any of DEP's adjudicatory rules. Ms. Lowery stated that it might be helpful for the Board to review DEP's rules because DEP's rules are specific regarding what a litigant needs to show in order to establish grounds for an appeal. Mr. Fierce pointed out that the Board currently used the standard adjudicatory rules for our appeal cases.

Ms. Phillips asked if the Board were to adopt DEP's adjudicatory rules, an LSP would need to be more specific in his/her Answer to the Order to Show Cause.

Mr. Fierce stated that yes that would be the case.

Mr. Luhrs asked whether it might be helpful to involve third parties in settlement negotiations earlier on. Ms. Lowery stated that she thought this might also be a good idea.

Ms. Lowery left the meeting at 2:15 p.m.

The Committee took a break at 2:15 p.m. to allow an Application Review Panel to meet.

The Committee reconvened at 3:16 p.m. Board Members present were Ms. Batchelder, Ms. Commerford, Mr. Franklin, Ms. Phillips and Ms. Race. Staff members present were Mr. Fierce, Mr. Quinlan, Ms. Read and Ms. Wood. Also present was Wesley Stimpson, the LSP Association's Interim Executive Director.

## **B. Status of CRTS**

At Ms. Commerford's request, the chair of each CRT reported on progress made during the last month.

**5. Future Meetings:** The Committee will next meet on March 5, 2007 at JSI Center for Environmental Health Studies in Boston. The Committee will also meet on April 18 at a location to be determined.

**6. Adjournment:** The meeting was adjourned at approximately 3: 37 p.m.